Tan Kau Tiah @ Tan Ching Hai v Tetuan Teh Kim Teh, Salina & Co (a firm) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1080 OF 2008
LOW HOP BING, ZAINUN ALI AND ABDUL MALIK ISHAK JJCA
5 MARCH 2010

Arbitration — Award — Finality of arbitration proceedings — Award granted in favour of second respondent — Undertaking by first respondent to comply with arbitral award or court order — Whether arbitration award final and binding — Whether first respondent was in breach of any undertaking after arbitral award was made — Whether first respondent was right to hold on to documents of title as stakeholder solicitors' in the face of pending applications by appellant and second respondent

Civil Procedure — Appeal — Interference by appellate court — Whether intervention by an appellate court in interest of justice was called for in this case

Civil Procedure — Interpleader — Nature of interpleader proceedings — Stakeholder's interpleader — Application for interpleader reliefs — Whether there was some real expectation of first respondent being sued — Whether collusion prevailed — Rules of the High Court 1980 O 17 r 1

Legal Profession — Solicitor's undertaking — Express undertaking by first respondent to comply with arbitral award or court order — Whether first respondent was in breach of any undertaking after arbitral award was made — Whether first respondent was right to hold on to documents of title as stakeholder solicitors in the face of pending applications by appellant and second respondent — Whether arbitration award final and binding

Legal Profession — Solicitors — Stakeholders — Express undertaking to return documents held as stakeholders upon arbitral award or court order — Whether bound by undertaking

The appellant was the registered proprietor of land situated in the district of Klang ('the land') while the second respondent was the developer of the land. The appellant and the second respondent had entered into a joint venture agreement whereby it was agreed that the latter would at its own cost and

expense convert the land, sub-divide it and thereafter construct houses and light industrial buildings on it in accordance with building plans to be approved by the relevant authorities. It was also agreed that the construction of the said buildings would be completed on or before 21 March 2000. The land was thereafter sub-divided into 19 plots and 18 documents of title were issued in respect of it. These 18 documents of title ('the documents of title') were deposited with the first respondent, a law firm, as stakeholders. Although the time frame for completing the construction of the buildings on the land was extended to 22 March 2003, the second respondent did not commence nor complete construction on the land. The appellant proceeded to terminate the contract for breach and claimed for the return of the land together with damages and cost. At the same time the appellant asked the first respondent to return the documents of title so as to mitigate the losses of the appellant and to avoid costly legal action. It was the appellant's contention that the contract had come to an end because the second respondent had failed to perform a fundamental term of the contract. The second respondent, on the other hand, accused the appellant of delaying the project and refused to accept the termination of the contract. The appellant then gave both respondents notice of its intention to arbitrate. However, the first respondent refused to participate in the arbitration on the grounds that the provision for arbitration for disputes was not applicable to it as it was not a party to the contract or any other agreement with the appellant. Instead, the first respondent gave written undertakings to release the documents of title to the appellant when the matter was decided by the arbitrator and/or the court. In addition, the first respondent, through one of its partners affirmed an affidavit that it was the first respondent law firm's duty as 'stakeholder solicitors to comply with the directions in the arbitration award or a court order'. Thereafter the dispute between the second respondent and the appellant was referred to arbitration. The arbitrator handed down an arbitral award in favour of the appellant, which was personally served on the first respondent. However, despite repeated demands the first respondent refused to hand over the documents of title to the appellant. At that point the first respondent filed the present originating summons, pursuant to O 17 of the Rules of the High Court 1980 ('RHC') and sought interpleader reliefs. The High Court allowed the first respondent's interpleader application and decided that the first respondent ought to continue to hold the documents of title pending proceedings by the second respondent to remove and/or restrain the arbitrator as well as an injunction to have the arbitral award set aside, as well as, a pending proceedings by the appellant for leave to enforce the arbitral award against the second respondent. This was the appellant's appeal against that decision. It was the appellant's contention that the first respondent must abide by its undertaking to hand over the documents of title to the appellant once an arbitration awarded was handed down by the arbitrator. The first respondent submitted that although they were

A B C D E F G H I

A stakeholders they had not undertaken any obligations and thus could not be in breach of any undertaking.

Held, allowing the appeal with costs:

B (1) Under r 1(1)(a) of O 17 of the RHC, which is more commonly known as a stakeholder's interpleader, interpleader relief should not be granted unless there was real foundation for the expectation of being sued. In the present appeal if the first respondent obeyed dutifully the arbitral award in discharging their stakeholders' duties, there would be no real C foundation for the expectation of being sued. Further, a mere direction or warning from the second respondent not to release the documents of title cannot be construed as a claim against the first respondent (see paras 23 & 26–28).

D (2) The affidavit affirmed by the first respondent, through one of its partners had employed the disjunctive word 'or' in regard to what had to be complied with ie either an arbitral award or a court order. Thus when the dispute between the parties ended with an arbitral award the first respondent must by their own admission comply with it. The E judicial commissioner had failed to appreciate the crucial fact that the first respondent had given their express undertaking in favour of the appellant upon the happening of an event, ie the receipt of an arbitral award or court order. Thus the intervention by an appellate court in the interest of justice was called for in this case (see paras 31, 60, 64, 82, & 84–85).

F (3) As stakeholders' solicitors the first respondent had to abide by their undertaking because the appellant had sought to enforce the undertaking given by the first respondent rather than the arbitration award. Further, there was no difference between an undertaking given G by a solicitor simpliciter and an undertaking given by a solicitor who held property as a stakeholder. In any case, as trustees of the documents of title the first respondent was not competent to take out a stakeholder's interpleader summons. The terms of the undertaking given by the first respondent were very clear and there was no need for H any adjudication or for a full trial (see paras 35–38, 41–42).

(4) The order for the immediate return of the documents of title was final and binding irrespective of whether there was any pending appeal to have it set aside. Once the arbitral order was handed down the I undertaking of the first respondent would come into play and must be given effect (see paras 70–72, 74, 80 & 99–100).

(5) The relationship shared between the directors and partners of the first and second respondents showed that there was collusion between the first and second respondents. Since collusion prevailed, the first

respondent's application for interpleader relief should have been dismissed with costs by the judicial commissioner (see paras 90 & 94).

[Bahasa Malaysia summary

Perayu merupakan pemilik berdaftar tanah yang terletak di daerah Klang ('tanah tersebut') manakala responden kedua adalah pemaju tanah tersebut. Perayu dan responden kedua telah memasuki satu perjanjian usahasama di mana ia telah dipersetujui bahawa responden kedua, di atas kos dan belanjanya sendiri akan menukar tanah tersebut, membahagikannya dan kemudian membina rumah dan bangunan industri ringan di atasnya menurut pelan bangunan yang diluluskan oleh autoriti-autoriti yang berkenaan. Ia juga dipersetujui bahawa pembinaan bangunan-bangunan tersebut akan disiapkan pada atau sebelum 21 Mac 2000. Tanah tersebut kemudiannya telah dibahagikan kepada 19 plot dan 18 dokumen hak milik telah dikeluarkan berkaitan dengannya. Kesemua 18 dokumen hak milik tersebut ('dokumen-dokumen hak milik tersebut') disimpan dengan responden pertama, sebuah firma guaman, sebagai pemegang akujanji. Walaupun had masa untuk menyiapkan pembinaan bangunan-bangunan tersebut di atas tanah tersebut telah dilanjutkan kepada 22 Mac 2003, responden kedua tidak memulakan mahupun menyiapkan pembinaan di atas tanah tersebut. Perayu meneruskan untuk membatalkan kontrak kerana kemungkiran dan memohon pemulangan tanah tersebut bersama-sama dengan ganti rugi dan kos. Pada masa yang sama perayu meminta responden pertama memulangkan dokumen-dokumen hak milik untuk mengurangkan kerugian perayu dan untuk mengelakkan tindakan undang-undang yang mahal. Perayu menghujah bahawa kontrak tersebut telah tamat kerana responden kedua telah gagal untuk melaksanakan terma-terma asas kontrak tersebut. Responden kedua, sebaliknya, menuduh perayu melambatkan projek dan enggan menerima pembatalan kontrak tersebut. Perayu kemudikannya memberikan kedua-dua responden notis mengenai niatnya untuk timbang tara. Walau bagaimanapun, responden pertama enggan mengambil bahagian di dalam timbang tara atas alasan bahawa peruntukan untuk timbang tara untuk pertikaian tersebut tidak terpakai terhadapnya kerana ia bukan pihak kepada kontrak atau apa-apa perjanjian lain dengan perayu. Sebaliknya, responden pertama memberikan akujanji bertulis untuk melepaskan dokumen-dokumen hak milik kepada perayu apabila perkara tersebut telah diputuskan oleh penimbangtara dan/atau mahkamah. Tambahan, responden pertama, melalui salah seorang daripada rakan kongsi mengikrarkan afidavit kerana ia adalah tanggungjawab firma guaman responden pertama sebagai 'stakeholder solicitors to comply with the directions in the arbitration award or a court order' Kemudian pertikaian di antara responden kedua dan perayu telah dirujuk kepada timbang tara. Penimbangtara memberikan award timbang tara memihak kepada perayu, yang telah diserahkan secara persendirian kepada responden pertama. Namun, walau diminta berkali-kali responden pertama menolak untuk

menyerahkan dokumen-dokumen hak milik kepada perayu. Pada masa itu, responden pertama memfailkan saman pemula ini, menurut A 17 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan memohon relief-relief interplider. Mahkamah Tinggi membenarkan permohonan interplider responden pertama dan memutuskan bahawa responden pertama harus terus menyimpan dokumen-dokumen hak milik sehingga pemutusan prosiding oleh responden kedua untuk menyingkirkan dan/atau menghalang penimbangtara dan juga untuk injunksi untuk award timbang tara diketepikan, dan, sementara menunggu prosiding oleh perayu untuk kebenaran untuk melaksanakan award timbang tara terhadap responden kedua. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu menghujah bahawa responden pertama mesti mematuhi akujanjinya untuk menyerahkan dokumen-dokumen hak milik kepada perayu sebaik sahaja timbang tara diawardkan oleh penimbangtara. Responden pertama menghujah bahawa walaupun mereka adalah pemegang akujanji mereka tidak mengakujanji apa-apa tanggungjawab dan oleh itu tidak boleh memungkiri apa-apa akujanji.

Diputuskan, membenarkan rayuan dengan kos:

(1) Di bawah k 1(1)(a) A 17 KMT, yang lebih dikenali sebagai interplider pemegang akujanji, relief interplider tidak boleh diberikan kecuali terdapat asas sebenar untuk dijangka disaman. Di dalam rayuan ini jika responden pertama mematuhi, dengan penuh tanggungjawab, award timbang tara dalam melaksanakan tanggungjawab pemegang akujanji, tidak akan ada asas sebenar untuk jangkaan akan disaman. Selanjutnya, arahan atau amaran semata-mata daripada responden kedua untuk tidak menyerahkan dokumen-dokumen hak milik tidak boleh ditafsirkan sebagai permohonan terhadap responden pertama (lihat perenggan 23 & 26–28).

(2) Afidavit yang diikrarkan oleh responden pertama, melalui salah seorang rakan kongsinya telah menggunakan perkataan pengasingan 'or' berkaitan dengan apa yang perlu dipatuhi iaitu sama ada award timbang tara atau perintah mahkamah. Oleh itu apabila pertikaian di antara pihak-pihak tamat dengan award timbang tara responden pertama mesti, melalui pengakuannya sendiri mematuhinya. Pesuruhjaya kehakiman telah gagal untuk menghargai fakta penting bahawa responden pertama telah memberikan akujanji nyata memihak kepada perayu jika berlaku perkara tersebut, iaitu penerimaan award timbang tara atau perintah mahkamah. Oleh itu campur tangan oleh mahkamah rayuan dalam kepentingan keadilan adalah perlu dalam kes ini (lihat perenggan 31, 60, 64, 82, & 84–85).

(3) Sebagai peguamcara pemegang akujanji, responden pertama mesti mematuhi akujanji mereka kerana perayu telah memohon untuk

melaksanakan akujanji yang diberikan oleh responden pertama dan bukan award timbang tara. Selanjutnya, tidak ada perbezaan di antara akujanji yang diberikan oleh peguamcara simpliciter dan akujanji yang diberikan oleh peguamcara yang memegang hartanah sebagai pemegang akujanji. Walau bagaimanapun, sebagai pemegang amanah dokumen-dokumen hak milik responden pertama tidak kompeten untuk mengeluarkan saman interplider pemegang akujanji. Terma-terma akujanji yang diberikan oleh responden pertama adalah sangat jelas dan tidak perlu untuk apa-apa pemutusan atau perbicaraan penuh (lihat perenggan 35–38, 41–42).

(4) Perintah untuk pemulangan segera dokumen-dokumen hak milik adalah muktamad dan mengikat tidak kira sama ada terdapat rayuan yang menunggu perbicaraan untuk mengetepikannya. Sebaik sahaja perintah timbang tara diberikan akujanji responden pertama akan mempunyai kesan dan harus dipatuhi (lihat perenggan 70–72, 74, 80 & 99–100).

(5) Hubungan yang dikongsi bersama oleh pengarah dan rakan kongsi responden pertama dan kedua menunjukkan bahawa terdapat pakatan sulit di antara responden pertama dan kedua. Oleh sebab pakatan sulit lebih mengatasi, permohonan responden pertama untuk relief interplider sewajarnya ditolak dengan kos oleh pesuruhjaya kehakiman (lihat perenggan 90 & 94).]

Notes

For a case on finality of arbitration proceedings, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1331.

For a case on nature of interpleader, see *Mallal's Digest* (4th Ed, 200 Reissue) para 3673.

For a case on stakeholders, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2110.

For cases on interference by appellate court, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1042–1065.

For cases on solicitor's undertaking generally, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2112–2113.

Cases referred to

A Solicitor, Re [1966] 3 All ER 52, Ch D (refd)

Arbitration between Mohamed Ibrahim & Koshi Mohamed, Re [1963] MLJ 32, CA (refd)

Chanter v Hopkins (1838) 150 ER 1484; 4 M & W 399 (refd)

Chin Leong Soon & Ors v Len Chee Omnibus Co Ltd & Anor [1970] 2 MLJ 228, FC (refd)

Edward Roberts v Robert Bell (1857) 119 ER; 7 EL & BL 323 (refd)

Gerhard and another v Montagu & Co, Low and Co, claimants (1889) 61 LT 564 (refd)
Givan, decd, Rees, In re v Green and others [1966] 1 WLR 1378, Ch D (refd)
Goldman v Abbott (1989) 139 Sol Jo 828 (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)
Idris bin Hassan v Lembaga Pertubuhan Peladang Perlis & Anor [2007] 6 MLJ 147, CA (refd)
Indah Water Konsortium Sdn Bhd v Yong Kon Fatt [2007] 5 MLJ 250, CA (refd)
Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401, FC (refd)
John Fox (a firm) v Bannister King & Rigbeys (a firm) [1987] 1 All ER 737, CA (refd)
Mayson v Clouet and another [1924] AC 980, HL (refd)
MCIS Insurance Bhd v Associated Cover Sdn Bhd [2001] 2 MLJ 561, HC (refd)
Metal Scrap Trade Corporation Ltd v Kate Shipping Co Ltd [1990] 1 WLR 115, HL (refd)
Murietta and others v South American, & C, Company-Dever and another, claimants (1892–93) 9 TLR 389 (refd)
OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal [2000] 1 MLJ 134, CA (refd)
Oriental Bank Bhd v Abdul Razak Rouse [1986] 1 MLJ 509, HC (refd)
Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd & satu lagi (No 2) [1996] 3 MLJ 421, CA (refd)
Photo Production Ltd v Securicor Transport Ltd [1980] 2 WLR 283, HL (refd)
Queen, The v His Honour Judge Turner and Hodgson [1897] 1 QB 445, QBD (refd)
Reading v School Board for London C Hopkinson & Sons, claimants (1885–86) 16 QBD 686 (refd)
RHB Bank v Comax Sdn Bhd & Anor [1999] 3 CLJ 552 (refd)
Suisse Atlantique Socit D'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361, HL (refd)
Sooltan Chund and others v Schiller and others [1879] 4 ILR Cal 252 (refd)
Sun Insurance Office (applicants) v Galinsky and others (claimants) [1914] 2 KB 545, CA (refd)
Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Ors [2007] 3 MLJ 305, CA (refd)
Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd [1984] 2 MLJ 313, HC (refd)
Tucker v Morris (1832) 149 ER 1; C & M 73; 2 LJ Ex 1 (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)
Watson v Park Royal (Caterers), Ltd [1961] 2 All ER 346, QBD (refd)

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)

Legislation referred to

Arbitration Act 1950 [UK] ss 16, 39
Arbitration Act 1952 (repealed by the Arbitration Act 2005) ss 17, 27
Contract Act 1872 [IND] s 39
Contracts Act 1950 s 40
Courts of Judicature Act 1964 Schedule item 5
Fires Prevention (Metropolis) Act 1774 [UK] s 83
Rules of the High Court 1980 O 17, O 17 rr 1(1)(a), 3(3)(b), O 28, O 28 r 7, 7(2)
Rules of the Supreme Court 1883 [UK] O LVII r 1(a)

Appeal from: Originating Summons No S7–24–1435 of 2007 (High Court, Kuala Lumpur)

Su Tiang Joo (William HS Foo with him) (Cheah Teh & Su) for the appellant.
Lee Swee Seng (Annou Xavier with him) (Lee Swee Seng & Co) for the first respondent.
N Chandran (Ranjan Chandran and Edwin Lim with him) (Edwin Lim & Suren) for the second respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant (Tan Kau Tiah @ Tan Ching Hai) against the decision of the learned judicial commissioner delivered at the High Court of Malaya at Kuala Lumpur in Originating Summons No S7–24–1435 of 2007 where His Lordship allowed the first respondent's (Tetuan Teh Kim Teh, Salina & Co (mendakwa sebagai suatu firma)) application for an interpleader summons.

FACTS OF THE CASE

[2] The appellant was the registered proprietor of all the land formerly held under EMR 8468, Lot No 2485 Mukim of Kapar, district of Klang ('the land') while the second respondent (Bintang Merdu Sdn Bhd) was the developer of the land. A joint venture agreement was entered into between the second respondent and the appellant on 22 March 1995 and this was followed by a supplemental joint venture agreement dated 23 April 1998 ('the contract'). The appellant had pursuant to the contract duly executed a power of attorney in favour of the second respondent.

A **[3]** It was agreed that the second respondent, at its own costs and expenses, caused the land to be converted, sub-divided and eventually construct thereon a mixture of one and half storeys detached, semi-detached and terraced type one and 1 1/2 storeys of light industrial buildings in accordance with the layout and building plans as may be approved by the relevant B authorities. And pursuant to the contract, the construction of the said buildings were to be completed on or before 21 March 2000. This was not done and the time frame was extended to 22 March 2003

[4] The land was sub-divided into 19 plots and 18 issue documents of titles C were deposited with the first respondent as stakeholders. It transpired that one plot of land was surrendered to the relevant authorities without the prior knowledge and/or consent of the appellant.

[5] The second respondent did not commence nor complete construction D of any industrial buildings on the land by 22 March 2003. The only building constructed on the land is a sewerage treatment plant which is meant to service the second respondent's neighbouring project.

E **[6]** On the basis that the second respondent had breached the contract, the appellant proceeded to terminate the contract and claimed for the return of the land together with damages and costs. The second respondent accused the appellant of delaying the project and refused to accept the termination of the contract.

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[7] By way of a letter dated 29 June 2005 and addressed to both the first and second respondents, the solicitors for the appellant set out in detail the grievances of the appellant. Both the respondents were invited to make good on their breaches. The first respondent was asked to return the documents of G titles so as to mitigate the losses of the appellant and to avoid costly legal action. Both the respondents too were given notice of the appellant's intention to arbitrate.

[8] The second respondent agreed to resolve the dispute by way of an H arbitration pursuant to the contract. But the first respondent by its letter dated 4 July 2005 declined to participate in the proposed arbitration proceedings and requested for a list of the proposed arbitrators for the second respondent's consideration. Again, by way of a letter dated 26 July 2005, the first respondent said that as their law firm was not a party to the contract or I any other agreement with the appellant, the provision for arbitration of disputes was not applicable to them.

[9] The first respondent expressly gave written undertakings to release the documents of titles as reflected in its letters dated 4 July 2005, 30 March

2007 and 6 April 2007. The first respondent's letter dated 4 July 2005 addressed to the appellant's solicitors carried the following averments (see p 435 of Bahagian 'C' Jilid 4):

> Since your client and our client are unable to settle their dispute amicably, we, as stakeholders of the title deeds, can only act according to the final decisions or instructions of the proper forum.

[10] While the first respondent's letter dated 30 March 2007 addressed to the appellant's solicitors carried the following averments (see p 339 of bahagian 'C' jilid 3):

> In view of the above proceedings, it is wholly premature to state who is the true beneficiary of our stakeholders' obligations. In the present situation, we cannot release those titles which are in our custody to any party until our receipt of a valid and binding order from either the Arbitrator or the High Court, as the case may be, in that respect.

[11] Finally, the first respondent's letter dated 6 April 2007 addressed to the appellant's solicitors was worded in this way (see p 345 of bahagian 'C' jilid 3):

> Our position is that all issues relating to the above matters must be left to be decided by the arbitrator and/or the court, as the case may be.

[12] It is interesting to note that Mr Teh Kim Teh, one of the partners of the first respondent, affirmed an affidavit in reply on 3 September 2007 on behalf of himself and the other partners of the first respondent. At para 8(b) of that affidavit in reply, he deposed as follows (see p 139 of bahagian 'B' jilid 2):

> As stakeholder solicitors, it is not my firm's function or right to decide for the above parties whether or not the JVA has been terminated. Instead, until the disputes between the above parties have fully settled, it is our solemn duty as stakeholder solicitors to hold onto the said 18 title deeds as trustees for both the first defendant (referring to the second respondent) as the developer and the second defendant (referring to the appellant) as the landowner.

[13] Mr Teh Kim Teh further deposed in his affidavit in reply at para 11(c) in this way (see p 140 of bahagian 'B' jilid 2):

> *There would also be no need for the second defendant (referring to the appellant) to institute arbitration proceedings against my firm* with regard to my firm's duty as stakeholder solicitors as we have no interest whatsoever in the 18 title deeds or in the outcome of the arbitration proceedings. *My firm's duty as stakeholder solicitors*

would only be to comply with the directions in the arbitration award or a court order provided that such award is proper, valid, binding and be duly registered in the High Court as a court order, before it is enforced against any party.

[14] The dispute between the second respondent and the appellant was referred to arbitration. The first respondent stakeholders' solicitors refused to participate in the arbitration. An arbitral award was handed down by the arbitrator on 4 May 2007 in favour of the appellant. And a copy of the arbitral award was personally served on the first respondent by the appellant on 8 May 2007. Notwithstanding the arbitral award and the repeated demands made by the appellant to the first respondent for the return of the 18 issue documents of titles, the first respondent refused to hand over the said titles.

[15] It must be borne in mind that the first respondent received two letters dated 7 May 2007 and 8 May 2007 from the appellant's solicitors requesting the first respondent to release the 18 land titles based on the arbitral award.

[16] The first respondent also received a direction and a warning from the second respondent's solicitors by way of a letter dated 10 May 2007 not to release the 18 land titles as the second respondent would be making an application to the High Court of Kuala Lumpur to set aside the arbitral award.

[17] On 10 May 2007, by way of a letter, the first respondent conveyed its reluctance to release the 18 land titles to the appellant. It appears that there was an expectation on the part of the first respondent of being sued by the second respondent if the 18 land titles were released to the appellant pursuant to the arbitral award. Conversely, if the 18 land titles were not released to the appellant the first respondent was said to be in breach of their stakeholders' solicitors undertaking to release the original 18 issue documents of titles in their possession pursuant to the arbitral award.

[18] Caught between the devil and the deep blue sea, so to speak, the first respondent filed the Originating Summons No S7–24–1435 of 2007 at the High Court Kuala Lumpur and sought interpleader reliefs. The first respondent wanted the second respondent and the appellant to state their respective claims and maintain an action for these claims.

[19] The learned judicial commissioner of the High Court allowed the first respondent's interpleader application and decided that the first respondent ought to continue to hold the original 18 issue documents of titles as

stakeholders pending the disposal of the suits in:

(a) the Kuala Lumpur High Court Originating Summons No R1–24–51 of 2007 which was an application filed by the appellant for leave to enforce the arbitral award akin to a judgment of the High Court; and

(b) the Kuala Lumpur High Court Originating Motion No R2–25–76 of 2007 which was an application filed by the second respondent for the removal of the arbitrator for misconduct and to restrain the said arbitrator from further conducting the arbitral proceedings.

[20] There were other pending Kuala Lumpur High Court applications, namely:

(a) an application by the second respondent for an injunction filed at the Kuala Lumpur High Court vide Originating Motion No R2–25–76 of 2007;

(b) an application by the second respondent to set aside the arbitral award filed at the Kuala Lumpur High Court vide Originating Motion No R2–25–133 of 2007; and

(c) an application by the first respondent to intervene in the suit filed at the Kuala Lumpur High Court vide Originating Summons No R2–25–133 of 2007.

ANALYSIS

[21] The first respondent's interpleader application was hinged on O 17 of the Rules of the High Court 1980 ('RHC'). That Order reads as follows:

1 Entitlement to relief by way of interpleader (O 17 r 1)

(1) Where —

(a) a person is under a liability in respect of a debt or in respect of any money, goods or chattels and he is, or expects to be, sued for or in respect of that debt or money or those goods or chattels by two or more persons making adverse claims thereto, or

(b) claim is made to any money, goods or chattels taken or intended to be taken by a sheriff in execution under any process, or to the proceeds or value of any such goods or chattels, by a person other than the person against whom the process is issued,

the person under liability as mentioned in sub-paragraph (a), or (subject to rule 2) the sheriff, may apply to the Court for relief by way of interpleader.

(2) References in this Order to a sheriff shall be construed as including references to any other officer charged with the execution of process by or under the authority of the High Court.

[22] Order 17 of the RHC confers a wide power on the court to grant relief by way of interpleader proceedings. Likewise item 5 of the Schedule to the Courts of Judicature Act 1964 (Act 91) gives the High Court additional powers to grant an interpleader relief. Interpleader proceedings are proceedings to assist the applicant to extricate himself from the embarrassment of being sued, or likely to be sued by more than one party in respect of the same subject matter and, at the same time, it would enable the claimants to be put in a situation where they can insist upon their claims.

[23] Rule 1(1)(a) of O 17 of the RHC is more commonly known as a stakeholder's interpleader and the relief under it is purely a matter of discretion (*The Queen v His Honour Judge Turner and Hodgson* [1897] 1 QB 445). It cannot be obtained as of right. Once the applicant satisfies the requirements, he is entitled to the relief sought. In determining whether it is just and proper for the relief to be granted, the court is free to exercise its discretionary power (*Gerhard and another v Montagu & Co, Low and Co, claimants* (1889) 61 LT 564).

[24] The expression 'a person is under a liability in respect of a debt or in respect of any money' appearing in r 1(1)(a) of O 17 of the RHC gives the impression that the applicant does not dispute the debt or the money or the applicant may admit some of the debt and dispute the balance (*Reading v School Board for London C Hopkinson & Sons, claimants* (1885–86) 16 QBD 686). The expression would certainly cover a situation where the debt is due and owing but not paid as yet.

[25] The phrase 'goods or chattels' employed in r 1(1)(a) of O 17 of the RHC would generally refer to personal property. It would also include shares in a company and title deeds to a property like the present appeal at hand (*In re Givan, decd, Rees v Green and others* [1966] 1 WLR 1378; and *Edward Roberts v Robert Bell* (1857) 119 ER 7; EL & BL 323).

[26] And the expression 'is, or expects to be, sued for or in respect of that debt or money or those goods or chattels by two or more persons' appearing in r 1(1)(a) of O 17 of the RHC must necessarily mean that the applicant is being, or is expected to be, sued by at least two persons. The requirement here is this. That the applicant must have some real expectation of being sued (*Watson v Park Royal (Caterers), Ltd* [1961] 2 All ER 346). And the claim must be actual and not something in anticipation (*Chin Leong Soon & Ors v Len Chee Omnibus Co Ltd & Anor* [1970] 2 MLJ 228 (FC)).

[27] Now, if there is no real foundation for the expectation of being sued, interpleader relief should not be granted. Here, if the first respondent obeys

dutifully the arbitral award in discharging their stakeholders' duties, there can be no real foundation for the expectation of being sued. A

[28] And a mere '*direction and warning*' from the second respondent not to release the 18 original issue documents of titles cannot be construed as a claim against the first respondent. We will now reproduce the letter dated 10 May 2007 from the solicitors for the second respondent addressed directly to the first respondent and that letter will show that there was no '*direction or warning*' from the solicitors of the second respondent but rather it was couched in general terms as a mere statement and nothing else. That letter was worded as follows (see p 327–328 of Bahagian 'C' Jilid 3): B C

> With regard to the demand for the return of the said titles, please take note of the following:-
>
> (i) our client Bintang Merdu has applied to the High Court to remove the Arbitrator in this matter on grounds of misconduct; D
>
> (ii) our client has also applied to amend the above application to set aside the interim 'Award' also for misconduct;
>
> (iii) our client has also applied by Summons for (an) Injunction to restrain the Arbitrator and the Claimant Tan Kau Tiah from taking further steps in this matter, and this application is part-heard before the Honourable Judge of the High Court; and E
>
> (iv) the 'Interim Award' has not been registered, and it is our client's intention to vigorously oppose any application to do so. F
>
> It is our client's view that the titles should be held by you as (a) stakeholder until the dispute is resolved, which is not the case at present.
>
> We trust (that) you will take into consideration the above matter in carrying (out) your duties as (a) stakeholder in this matter and in deciding the status of the said titles. G

[29] Ali FCJ writing a separate judgment for the Federal Court in *Chin Leong Soon & Ors v Len Chee Omnibus Co Ltd & Anor* at p 233, aptly said: H

> Another reason for this conclusion is that there is no real foundation for the expectation to be sued. In *Watson v Park Royal (Caterers), Ltd* [1961] 2 All ER 346, Edmund Davies J said at p 352:
>
> > There is ample authority for the proposition that the discretionary relief of interpleader will not be granted unless there appears to be some real foundation for the expectation of a rival claim: see *Issac v Spilsbury* (1833) 2 Dowl 211; 131 ER 805; *Harrison v Payne* (1836) 2 Hodg 107 and *Sharpe v Redman* (1837) 2 Will Woll & Dav 375. I

A The respondent company seeking interpleader relief must make out a case for relief. In this case it must be shown that Chin Sow Lan's claim provides a real foundation for expectation to be sued. It is not enough for the company to say that Chin Sow Lan has made a claim. Were it otherwise the object of granting interpleader relief would be defeated.

B

[30] The English Court of Appeal in *Sun Insurance Office (applicants) v Galinsky and others (claimants)* [1914] 2 KB 545, refused relief by way of an interpleader to the insurance company. That was a case where a house was C insured against fire in the joint names of the lessor and lessee. During the currency of the policy the house was burnt down and the lessor served notice on the insurance company under s 83 of the Fires Prevention (Metropolis) Act 1774, requesting them to cause the insurance money to be laid out and expended in or towards rebuilding the house. The lessee wrote a letter to the D insurance company which the latter contended amounted to a claim that the insurance money should be paid to him. The insurance company took out an originating summons for relief by way of interpleader under O LVII r 1(a). Vaughan Williams LJ refused to grant the interpleader relief to the insurance company on the grounds that the lessee had not made any claim to the E insurance company, and that, consequently, there were not '*two or more parties making adverse claims*' within O LVII r 1(a). Buckley and Kennedy LJJ, also refused interpleader relief to the insurance company on the grounds that as the lessor was claiming the performance by the insurance company of their statutory obligation under s 83 of the 1774 Act to expend the insurance F money in rebuilding the house and as the lessee was claiming that the insurance company should pay the money to him, there were not two or more parties making '*adverse claims*' in respect of a liability of the insurance company '*for any debt, money, goods, or chattels*' within O LVII r 1(a).

G

[31] It would certainly be appropriate, at this juncture, to take into account the express admission on oath of Mr Teh Kim Teh in regard to the first respondent's role as stakeholders' solicitors and their duty. We must emphasise that in his affidavit in reply, Mr Teh Kim Teh had employed the H disjunctive word 'or' in regard to what has to be complied. It was either an arbitration award or a court order. And since the dispute between the appellant and the second respondent ended with an arbitration award by the arbitrator, the first respondent must by their own admission comply. There are no two ways about it.

I

[32] It was argued on behalf of the first respondent that the arbitration award must first be registered in the High Court before it can be enforced against any party. It must be recalled that the first respondent refused to be a party to the arbitration. That being the case, the issue of enforcing the

arbitration award against the first respondent did not arise. The appellant had sought to enforce not the arbitration award but rather the undertaking given by the first respondent.

[33] As stakeholders' solicitors, the first respondent must abide by their undertaking. Mistake cannot be a defence available to the first respondent. The first respondent must be bound by the express undertaking given in favour of the appellant. Siti Norma Yaakob JCA (later Chief Judge of Malaya) in *OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal* [2000] 1 MLJ 134 (CA) at p 143, spoke of the essence of a stakeholding and as to the liability of a stakeholder in these words:

> Before us, it was acknowledged that the recalcitrant party were the stakeholders who had absconded with the balance of the purchase price. What then, in law is the essence of a stakeholding? That question was asked and answered in the case of *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116 where the then Supreme Court held that the word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held.
>
> I next ask what is the liability of a stakeholder? That question was also asked and answered by Lord Denning MR in his dissenting judgment in the case of *Burt v Claude Cousins & Co Ltd & Anor* [1971] 2 QB 426 at p 435 as follows:
>
> > If an estate agent or a solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event.
> >
> > This decision has been accepted with approval in our courts as seen from the cases of *Toh Theam Hock* and *Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256.

[34] It is acknowledged that the case of *OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal* was not concerned with an interpleader application like our present appeal. And it is also noted that that case made no reference to O 17 of the RHC unlike our present appeal. But the speech of Siti Norma Yaakob JCA (later Chief Judge of Malaya) as reproduced above can readily be applied even to the present appeal at hand. They are of universal application.

[35] It was argued on behalf of the second respondent that one must not confuse between solicitors undertaking simpliciter with that of solicitors who have been entrusted with a chattel to be held as stakeholders. Whatever language you employ to describe the first respondent, one thing is clear. A rose is still a rose no matter what you call it. That the first respondent either

in breach of the stakeholders' obligations had given an undertaking can never be doubted. And when the first respondent failed and/or refused to release the 18 original land titles to the appellant upon the occurrence of the event, the first respondent must be held accountable.

[36] We must reiterate that the appellant is not seeking to enforce the arbitration award against the first respondent, rather the appellant is seeking to enforce the first respondent's obligations as stakeholders' solicitors upon the occurrence of the event under which the first respondent are holding the stake of the original 18 issue documents of titles.

[37] There is no difference between an undertaking given by a solicitor simpliciter and an undertaking given by a solicitor who holds property as a stakeholder. It is still an undertaking of a solicitor.

[38] It has been said that undertakings are given and adhered to as a matter of professional honour and that a breach of one undertaking is prima facie considered to be professional misconduct. The court certainly has the power to enforce an undertaking by virtue of its power of inherent jurisdiction over its own officers.

[39] The nature of the inherent jurisdiction of the court to enforce a solicitor's undertaking was stated by Nicholls LJ in *John Fox (a firm) v Bannister King & Rigbeys (a firm)* [1987] 1 All ER 737 (CA). That case concerned a solicitor's undertaking said to have been given in 1982 by Mr J W Bannister, a partner in the defendant's firm to Mr John Fox, who is the senior partner of the plaintiff's firm. In a separate judgment, Nicholls LJ had this to say at p 740 of the report:

> The basic principles applicable in the present case are not in doubt. The jurisdiction being invoked here is the inherent jurisdiction which the Supreme Court has over solicitors, who are its officers. It is a jurisdiction which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the court's own officers: see *Re Grey* [1892] 2 QB 440 at p 443 per Lord Esher MR.
>
> One of the areas in which this principle falls to be applied is the enforcement of undertakings given by solicitors in their capacity as solicitors. As officers of the court solicitors are expected to abide by undertakings given by them professionally, and if they do not do so they may be called on summarily to make good their defaults: see *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296 at p 305; [1908–10] All ER Rep 876 at p 881 per Hamilton J. Where a solicitor, directly or indirectly, still has it in his power to do the act which he undertook to do, the court may order him to do that act. Where the solicitor does not have it in his power, he may be ordered to make good the loss flowing from his failure to perform the undertaking, as loss flowing from a breach of duty committed by a

solicitor as an officer of the court: see *Marsh v Joseph* [1897] 1 Ch 213 p at 245; [1895–9] All ER Rep 977 at p 981 per Lord Russell CJ. A

[40] And in the case of an undertaking, where there is no evidence that it is impossible to perform, the order will usually be to require the solicitor to do that which he has undertaken to do (*Re A Solicitor* [1966] 3 All ER 52). B

[41] Since the outcome of the arbitration has been determined, the first respondent must strictly comply with their undertaking. It is our judgment that the first respondent as trustees of the 18 original issue documents of titles are not competent to take out a stakeholder's interpleader summons. C

[42] Pure and simple, the case of the appellant pertains to an enforcement of the breach of an undertaking given by the first respondent. It is our judgment that the terms of the undertaking given by the first respondent are very clear and there is no necessity for any adjudication or for a full trial. The first respondent must comply with their undertaking. D

[43] Once again, we revert to the obligations of the second respondent under the contract. We say that in fundamental breach of its obligations under the contract, the second respondent did not commence let alone complete construction and deliver vacant possession of those buildings by 22 March 2003. Only the sewerage treatment plant was constructed. E

[44] Each contract contains some central critical obligation and by its non-performance there could be no performance of the contract as a whole. This central critical obligation is referred to as a '*fundamental term*' and the breach of it is equivalent to a non-performance of the contract. F

[45] It is ideal to refer to the speech of Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] 2 WLR 283 (HL). There at p 294, Lord Diplock defined '*fundamental breach*' as '... the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, ... '. G H

[46] The principles governing both '*fundamental term*' and '*fundamental breach*' are well illustrated by Lord Abinger CB in *Chanter v Hopkins* (1838) 150 ER 1484 at p 1487; 4 M & W 399, when His Lordship said: I

> '... if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him any thing else in their stead, it is a non-performance of it.

[47] A finding that there has been either a breach of a fundamental term or a fundamental breach would mean that the party not in default may put an end to the contract — in the sense that whatever obligations then outstanding need no longer be performed by either party, and the aggrieved party may sue for damages for any loss suffered as a result of the other party's non-performance. This is the situation in which the appellant found himself in. The second respondent failed to perform the central critical obligation under the contract. So the appellant considered the contract to have come to an end and sued for damages.

[48] The law has been lucidly stated by Lord Dunedin in *Mayson v Clouet and another* [1924] AC 980 (HL) at p 985, in this way:

> Their Lordships do not think it necessary to inquire as to a matter on which there was much argument, whether the word 'rescission' is used in various judgments in a settled or a varying sense. The law is quite plain. If one party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end — ie, no longer binding on him — while retaining the right to sue for damages in respect of the breach committed.

[49] In *Suisse Atlantique Socit D'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) at p 422 Lord Upjohn defined the expression '*fundamental term*' in language which clearly indicated that he regarded it as an alternative way of referring to a condition, ie a term which went to the root of the contract so that any breach of it entitled the innocent party to be discharged.

[50] Statute wise, there is s 40 of the Contracts Act 1950 which enacts as follows:

> 40 Effect of refusal of party to perform promise wholly
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.
>
> ILLUSTRATIONS
>
> (a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her $100 for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of $100 for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

[51] Put briefly, s 40 of the Contracts Act 1950 provides that when a party to a contract refused to perform or disabled himself from performing his promise in its entirety, the innocent party is free to put an end to the contract. Garth CJ in *Sooltan Chund and others v Schiller and others* [1879] 4 ILR Cal 252 at p 255, aptly said that s 39 of the Indian Contract Act of 1872 which is equivalent to our s 40 of the Contracts Act 1950:

> ... only means to enact what was the law in England, and the law here, before the Act was passed, — viz, that where a party to a contract refuses altogether to perform, or is disabled from performing, his part of it, the other side has a right to rescind it.

[52] Not to be outwitted, the first respondent argued that the word '*undertaking*' was not used in their letters and so there was no clear and express undertaking given by them. While admitting that they are stakeholders, the first respondent denied that they have undertaken any obligations and thus cannot possibly be in breach of any undertaking. It is certainly an ingenious argument. It offends against the concept of stakeholding — which would be to hold a stake until the happening of a certain event coupled with a duty or an undertaking to act upon the happening of the event. In *Oriental Bank Bhd v Abdul Razak Rouse* [1986] 1 MLJ 509, the word '*undertaking*' was not set out in the stakeholder solicitors' letter, yet Abu Mansor J (later FCJ) held that it was a breach of the undertaking when the solicitors failed to present a charge in favour of the bank after the bank had released the redemption sum. His Lordship looked at the character of the undertaking and not the form in which it was drafted. This court in *Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Ors* [2007] 3 MLJ 305 (CA) cited with approval the judgment of Abu Mansor J (later FCJ) in *Oriental Bank Bhd v Abdul Razak Rouse*.

[53] Next, we have this to say about the arbitral award. It is akin to a judgment. In his award, the arbitrator makes reference to the Arbitration Act 1952 (Act 93) and we shall likewise do so. Section 17 of the Arbitration Act 1952 (Act 93) enacts as follows:

> 17 Awards to be final

> Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

[54] Section 17 of the Arbitration Act 1952 (Act 93) reflects the hitherto common law position. Gopal Sri Ram JCA (now FCJ) speaking for this court in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 (CA) at p 487, had this to say:

> The general rule at common law is that, absent a contrary intention in the agreement to arbitrate entered into between the parties to a controversy, the award of an arbitrator is final, binding and conclusive. It may not be challenged merely on the ground that it is erroneous.

[55] It is appropriate to mention that our Arbitration Act 1952 (Act 93) was modelled after the Arbitration Act 1950 (14 Geo 6, Ch 27) of the United Kingdom. Our s 17 of the Arbitration Act 1952 (Act 93) is worded similarly like s 16 of the Arbitration Act 1950 (14 Geo 6, Ch 27) of the United Kingdom which reads as follows:

> 16 Awards to be final
>
> Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

[56] Section 39 of the Arbitration Act 1950 (14 Geo 6, Ch 27) of the United Kingdom adds a different complexion entirely. That section reads as follows:

> 39 Meaning of 'final award'
>
> For the purposes of this Part of this Act, an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

[57] There is no similar provision in our Arbitration Act 1952 (Act 93) like s 39 of the Arbitration Act 1950 (14 Geo 6, Ch 27) of the United Kingdom. Thus, the award under our Arbitration Act 1952 (Act 93) is expressly stated to be final and binding irrespective of whether there is any pending appeal to have it set aside.

[58] But that does not mean that the second respondent cannot apply to have the arbitral award set aside or for that matter resist the application of the appellant to enforce the arbitral award. And even if the arbitral award is for some reason or other is set aside at a later stage, the first respondent should and must adhere to its own undertaking once the arbitral award was handed down on 4 May 2007. The reason for this approach is quite simple. The future event which the undertaking is premised upon has come to pass. It is our judgment that the first respondent must honour its express undertaking which crystallises into a strict duty to release 18 original titles to the appellant upon the arbitral award being handed down in favour of the appellant by the arbitrator.

[59] We venture to say that even if the first respondent were to later succeed in its main suit, an undertaking for damages given by the first respondent to secure say an ex parte order for an injunction has to be made good by the first respondent if the ex parte order for an injunction is set aside. On the other end of the scale, it must not be forgotten that any non-compliance with an order for an interim injunction may amount to contempt even if the first respondent fails to secure a permanent injunction (*Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd* [1984] 2 MLJ 313; and *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 (SC)).

[60] It is our judgment that the learned judicial commissioner failed to appreciate not only the express provisions of s 17 of the Arbitration Act 1952 (Act 93) but also the crucial fact that the first respondent had given their express undertaking in favour of the appellant upon the happening of an event and that would be upon '*receipt of a valid and binding order from either the arbitrator or the High Court, as the case may be, in that respect*' (see the first respondent's letter dated 30 March 2007 found at p 339 of bahagian 'C' jilid 3).

[61] It was argued by the first respondent that their letter dated 30 March 2007 alluded to a condition that there was a need to have the arbitration award to be registered first before it can be binding upon them. We have reproduced the salient parts of the letter dated 30 March 2007 in the early part of this judgment (see p 339 of bahagian 'C' jilid 3) and in the preceding paragraph and we found that there was no such condition stipulated in the said letter at all.

[62] It was argued on behalf of the first respondent that the appellant was seeking to register the arbitral award under s 27 of the Arbitration Act 1952 (Act 93). However, s 27 of the Arbitration Act 1952 (Act 93) talks of an enforcement of an award and not in regard to registering an arbitral award. That section is worded as follows:

A 27 Enforcement of award

An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, where leave is so given, judgment may be entered in terms of the award.

B

[63] And it simply means this. That the appellant is seeking to enforce the arbitral award against the losing party named therein. And if the losing party complies with the arbitral award, there would be no necessity to apply for leave to enforce the said award. Section 27 of the Arbitration Act 1952 (Act C 93) does not say that lack of such leave to enforce would make the arbitral award not valid or non-binding. Not securing leave to enforce the arbitral award would simply mean that the winning party is not entitled to secure the aid of the court machinery to enforce the arbitral award which is akin to a judgment secured in most proceedings. But we must re-iterate that the first D respondent was not a party to the arbitration. The first respondent refused to participate in the arbitration. Thus, there is no necessity to seek leave of the court to enforce the arbitral award against the first respondent. The appellant is merely relying on the undertaking given by the first respondent upon occurrence of an event. Here, the event would be the handing down of the E arbitration award by the arbitrator on 4 May 2007.

[64] An undertaking requires no formality. It need not be in writing and the word '*undertaking*' need not be used. If the undertaking is in writing, like F the present appeal at hand, it would be sufficient if the words used can be clearly construed as a promise given by a solicitor and that it is intended to be relied upon. In *John Fox (a firm) v Bannister King & Rigbeys (a firm)*, the following words used by the solicitor were construed as an undertaking (see p 739 of the report):

G

... no doubt you and Geoff (the client) will sort out as to the £18,000.00 which is still in my account and which of course I shall retain until you have sorted everything out.

H **[65]** According to the case of *Goldman v Abbott* (1989) 139 Sol Jo 828, an undertaking can be construed from several documents read together.

[66] Now, with the handing down of the arbitration award, it matters not that there are pending proceedings by the second respondent to remove the I arbitrator for misconduct and to restrain the arbitrator from acting further as well as for an injunction and to have the arbitral award set aside. With the handing down of the arbitration award it matters not that there is a pending proceeding by the appellant for leave to enforce the arbitral award against the second respondent.

[67] The first respondent has the audacity to argue that this appeal is premature and that the appellant must await the outcome of the other proceedings in the High Court bearing in mind that the first respondent was not even a party to the arbitration and the arbitral award. Yet the first respondent expressly accepted that they hold the 18 original titles on trust. As trustees, the first respondent are certainly in breach of trust when they failed to release the 18 original titles after the arbitrator has handed down his award.

[68] The Federal Court in *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401 at p 407, held that an arbitrator's award is final, binding and conclusive and can only be challenged in exceptional circumstances.

[69] Both the respondents argued that the arbitral award was an '*interim award*'. But there is no law to say that an '*interim award*' is not final within the provisions of s 17 of the Arbitration Act 1952 (Act 93).

[70] The arbitrator in his award wrote and expressly said (see p 263 of the appeal record):

> Now, I, Sundra Rajoo, having accepted the appointment as arbitrator and having taken upon myself the burden of the arbitration, having heard the parties claims and defence, having viewed and considered carefully all the documents, all the evidence presented and all the written submissions by them, do HEREBY MAKE AND PUBLISH THIS MY FINAL AWARD as set out hereunder.

[71] And in regard to the return of the 18 original titles, the arbitrator expressly held (see p 318 of the appeal record):

> Accordingly, I hereby find, declare, determine and award of the matters in difference and referred to me in this Arbitration:
>
> (1) The immediate return by the Respondent (Bintang Merdu Sdn Bhd, the developer) to the Claimant (Tan Kau Tiah @ Tan Ching Hai, the landowner) of all the remaining 18 original issue documents of titles without any conditions whatsoever.

[72] It is our judgment that the subject matter for which the first respondent seeks interpleader relief — and that would be the 18 original issue documents of titles, have been ordered to be returned immediately to the appellant. We say categorically that there is nothing temporary or interim about this part of the arbitral award.

[73] The only thing interim about the arbitral award would be in relation to para 20.0(9); para 20.0(10); para 20.0(11); para 20.0(12); and para

20.0(16) of the said award. And they relate to damages that require to be assessed after the second respondent has, inter alia, returned the 18 original issue documents of titles.

[74] The order for the immediate return of the 18 original issue documents of titles is final.

[75] Rose CJ had this to say about an award in *Re Arbitration between Mohamed Ibrahim & Koshi Mohamed* [1963] MLJ 32 (CA):

> 'Award' is not a term of art; and it seems to me that the test as to whether an award, be it final or interim, has been made must depend upon whether the order in question amounts to a decision. The principle is stated in the 16th edition of Mr Russell's book on arbitration at p 224: 'any form of words amounting to a decision of the questions referred will be good as an award. No technical expressions are necessary.'
>
> It seems to me that the order of 25 September does amount to a decision of some of the questions referred and that, although the order is of an interim nature, it nonetheless should be regarded as an 'award'.

[76] KC Vohrah J (later JCA) in *MCIS Insurance Bhd v Associated Cover Sdn Bhd* [2001] 2 MLJ 561 at pp 567–568, had this to say:

> A reference to *Halsbury's Laws of Singapore*, Vol 2 at p 83, para [20.095] shows clearly the juristic thinking that an award is final in its terms in that in so far as it relates to the issues decided therein it is final whatever one might call the award. The passage reads:
>
> [20.095] 'Interim', 'partial' and 'interlocutory'
>
> The terms 'interim', 'partial' and 'interlocutory' have no statutory definition. All awards are final in their terms in that in so far as relating to the issues decided therein, they are final. In practice, the term 'interim award' is generally used to describe any award that is not final (last) award in the arbitration. Decisions on issues of the applicable proper law, time-bar defences, joinder of parties and arbitral jurisdiction have been described as interim awards, as have awards made on part of the claims only, either on the basis of admission or following a decision of a part only of the issues in dispute. The terms 'partial award' is sometimes used to describe awards on part of the claims only. *An interlocutory award would normally be an award that deals with certain issues such as liability (being final on the issue) leaving quantum to be further assessed*. Partial awards and interlocutory awards could also be termed 'interim awards'. An award dealing with all the issues in the claim and the counterclaim but leaving the issue of costs to be argued is nevertheless often termed an interim award.

[77] Continuing further down at the same page, KC Vohrah J (later JCA) said in the same case as follows: A

> Then again, an 'interim award' used in the sense to describe an award that settles the issue whether there is liability on a claim made under a reference to the arbitrator must also be viewed in the context of the principle that the arbitrator becomes functus officio in respect of the issues disposed off in the award. In connection with this the passage from *Halsbury's Laws of Singapore*, Vol 2, 98 para [20.116] is relevant: B
>
> > [20.116] Arbitrator becomes functus officio C
> >
> > A valid award once made is enforceable against the party against whom it is made. If the award is the final award, it terminates the arbitration and extinguishes the original cause of action. The arbitrator becomes functus officio upon making of the final award and cannot alter, add to or make supplementary awards except for clerical or calculation errors. In the case of an interim award the arbitrator becomes functus in respect of issues disposed in the interim award. D

[78] There is a book written by Sundra Rajoo entitled *Law, Practice And Procedure of Arbitration* that is worth referring to. At p 426 of the said book, the learned author wrote: E

> An award is the decision or determination rendered by arbitrators or commissioners, or other private or extra-judicial deciders, upon a controversy submitted to them; it also includes the writing or document embodying such decision (*Black's Law Dictionary* (6th Ed, 1997)). F

[79] Again at p 427 of the same book, the learned author wrote:

> The test is whether an award, be it final or interim, in any form of words, amounts to a decision of the questions referred for determination by the arbitrator. The court in *Re Arbitration between Mohamed Ibrahim and Koshi Mohamed* [1963] MLJ 32 regarded the arbitrator's order as an award even though it was of an interim nature because it amounted to a decision of some of the questions referred. Each award is complete in itself; it is a final decision on the matters to which it relates. G

H

[80] The sum total of it all is this. That the arbitrator has given a final decision. It is for the immediate return of the 18 original issue documents of titles to the appellant.

[81] In reply to the argument that the decision of the learned judicial commissioner was made in the exercise of His Lordship's discretion and not warranting an appellate intervention by this court, we have this to say. I

[82] The exercise of any judicial discretion is not absolute. An appellate court can certainly review question of discretion if it is satisfied that the judge was wrong in applying the wrong section of the statute. Here, the learned judicial commissioner wrongly relied on s 7 of the Arbitration Act 1952 (Act 93), which section has no relevance at all to the factual matrix of the case. Section 7 of the Arbitration Act 1952 (Act 93) reads as follows:

> 7 Reference of interpleader issues to arbitration
>
> Where relief by way of interpleader is granted and it appears to the High Court that the claims in question are matters to which an arbitration agreement, to which the claimants are parties, applies, the High Court may direct the issue between the claimants to be determined in accordance with the agreement.

[83] It is obvious that the learned judicial commissioner's reliance on s 7 of the Arbitration Act 1952 (Act 93) is misconceived because the arbitration proceedings had concluded with an arbitral award dated 4 May 2007.

[84] It is apparent that the learned judicial commissioner failed to have due regard to s 17 of the Arbitration Act 1952 (Act 93) which has been reproduced earlier. That s 17 is the correct section to rely upon bearing in mind that the arbitration has ended with an arbitral award in favour of the appellant.

[85] Intervention by an appellate court in the interest of justice is certainly called for in this case. Abdoolcader J, speaking for the Federal Court in *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 at p 151, aptly said:

> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v Johnston* [1942] AC 130 at p 148 per Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473.

[86] And this very passage was referred to with approval by this court in two cases, namely:

(a) *Indah Water Konsortium Sdn Bhd v Yong Kon Fatt* [2007] 5 MLJ 250 (CA) at p 270; and

(b) *Idris bin Hassan v Lembaga Pertubuhan Peladang Perlis & Anor* [2007] 6 MLJ 147 (CA) at pp 156–157.

[87] We would certainly intervene and right the wrong.

[88] We now highlight the following salient facts. Mr Teh Kim Loh is the director of the second respondent and he affirmed the affidavits found at pp 83–107 as well as at pp 165–187 of bahagian 'B' jilid 2. While Mr Teh Kim Teh is the partner of Messrs Teh Kim Teh, Salina & Co and he affirmed the affidavits found at pp 48–58 and at pp 126–143 of bahagian 'B' jilid 2. These two gentlemen are brothers.

[89] On the other hand, Madam Wong Kooi Heong, one of the other partners of the first respondent is the wife of Mr Teh Kim Teh. This would also mean that she is the sister-in-law of Mr Teh Kim Loh.

[90] We set out these salient facts in order to show that there is collusion between the first and the second respondents. It is for this reason that interpleader relief should not be given to the first respondent. Authorities like *Murietta and others v South American, & C, Company-Dever and another, claimants* (1892–93) 9 TLR 389; and *Tucker v Morris* (1832) 149 ER 1; C & M 73; 2 LJ Ex 1 state that collusion refers to '*playing the same game*' as one of the claimants.

[91] Order 17 r 3(3)(b) of the RHC states as follows:

> (3) Subject to paragraph (4), a summons under this rule must be supported by evidence that the applicant —
>
> (b) does not collude with any of the claimants to that subject-matter.

[92] Zainun Ali J (now JCA) in *RHB Bank v Comax Sdn Bhd & Anor* [1999] 3 CLJ 552, at p 557, had this to say of collusion:

> On the second precondition, (r 3(3)(b)), it must be shown that the applicant does not collude with any of the claimants to the subject matter. Though the line between interest and collusion is tenuous, it is nevertheless obvious that there must be no identification of interest between the applicant and the claimant. Collusion does not necessarily envisage something which is morally wrong, but only that the applicant must not 'play on the same side' as one of the claimants (*Murrieta*'s case) as well as *Tucker v Morris* [1832] 1 C & M 73; 2 LJ Ex 1.

[93] Mr Teh Kim Teh affirmed, on 25 June 2007, an affidavit in support of the interpleader application where at para 13 of the said affidavit, he deposed as follows (see p 58 of bahagian 'B' jilid 2):

> My partners and I decided to make this application as we were stakeholders without any interests nor do we take the side of any parties in the land title issue and is only making this application for direction from this honourable court.

[94] But no where in the affidavit in support was there any averment by Mr Teh Kim Teh that he did not collude with anyone nor was there an averment in regard to his brother and his wife. There was no transparency in his affidavit in support. The evidence, however, showed collusion. Since collusion prevailed between the first and the second respondents, the first respondent's application for interpleader relief should have been dismissed with costs by the learned judicial commissioner.

[95] We now turn to the appellant's counterclaim that was not considered by the learned judicial commissioner but was raised in the appellant's memorandum of appeal. In his affidavit in reply that was affirmed on 3 August 2007 as seen at pp 80–81 at paras 32–37 of bahagian 'B' jilid 2, the appellant averred as follows:

> 32. From the facts as disclosed, particularly with the arbitral Award, having been handed down in my favour, I am advised by my solicitors whom I verily believe that the Plaintiff (referring to the first respondent) is in gross breach of their joint and several duties/obligations as stakeholders to me.
>
> 33. Now, to compound my suffering, the Plaintiff (referring to the first respondent) vex me with this action.
>
> 34. This action has, as I am advised by my solicitors whom I verily believe and who to quote a learned High Court judge, a special aggravating element where the Plaintiff's (referring to the first respondent) act of breaches of their stakeholders' obligations have an element of subtlety. By engaging lawyers and invoking legal process, this action and acts of the Plaintiff (referring to the first respondent) have an outward appearance of professionalism, sophistication and legality. Such a modus operandi makes me but a helpless victim.
>
> 35. Without the titles, I am not in a position to take possession of the property and I have suffered not only financially but also both in terms of my physical and mental health due to the failure and refusal of the Plaintiff (referring to the first respondent) to discharge their stakeholders' obligations.
>
> 36. I seek to and do counterclaim against the Plaintiff (referring to the first respondent) for their breaches of their obligations and the hurt caused to me both physical and mental. I seek the return of my property in the form of the titles wrongfully being detained by the Plaintiff (referring to the first

respondent) and for general, exemplary and aggravated damages that I have suffered at their hands, the same whereof to be assessed by this Honourable Court.

37. I also seek to and do counterclaim against the Plaintiff (referring to the first respondent) for causing me to lose the 19th title allegedly surrendered for the construction of a sewerage treatment plant, which alleged surrender was not brought to my attention at all prior to the release thereof by the Plaintiff (referring to the first respondent).

[96] The appellant's counterclaim was also raised during the proceedings before the learned judicial commissioner. Order 28 r 7 of the RHC allows the appellant to raise the counterclaim in the originating summons of the first respondent. In contesting the counterclaim raised by the appellant, the first respondent takes the position that in an interpleader proceeding, no counterclaim was ever allowed. We beg to disagree.

[97] This appeal brings into sharp focus the question of whether the defendant (like the appellant at hand) in an action begun by originating summons for which no appearance need be entered may make a counterclaim in the action. We would answer this question in the affirmative. Lord Bridge of Harwich, in a separate judgment, said in *Metal Scrap Trade Corporation Ltd v Kate Shipping Co Ltd* [1990] 1 WLR 115 at p 117:

> If the subject matter of the counterclaim is wholly unrelated to the subject matter of the claim, that may well be a ground for striking out the counterclaim under the RSC O 28 r 7(3). But where, as here, the subject matter of the claim and counterclaim are inseparably interconnected, the proposition that they ought to be disposed of in separate proceedings flies in the teeth of the common sense and common justice of the case.

[98] This court in *Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd & satu lagi (No 2)* [1996] 3 MLJ 421 (CA) held that an information contained in affidavits for action commenced by way of originating summons under O 28 of the RHC is sufficient to amount to information required by O 28 r 7 of the RHC as to amount to a counterclaim. This court also held that the language used in O 28 r 7(2) of the RHC is simple, clear and does not require any interpretation.

[99] It cannot be denied that with the multiple suits and applications launched by the first and second respondents, they have succeeded in delaying their obligations under and pursuant to the arbitral award. All these tactical manoeuverings not only defeats the appellant's right as the registered proprietor of the 18 land titles but it also defeats the purpose of having an arbitration which is said to be quick and cheap.

[100] The finality of the arbitral award cannot be doubted. And once the arbitral award was handed down by the arbitrator in favour of the appellant, the undertaking by the first respondent would come into play. The first respondent stakeholders' undertaking must accordingly be given effect.

[101] For the reasons adumbrated above, we allow the appellant's appeal with costs of RM20,000. We set aside the decision of the learned judicial commissioner given on 6 March 2008.

[102] We order the first respondent to forthwith, and not later than ten days from the date of the service of the order of this court, return the 18 original issue documents of titles as particularised herein to the appellant:

(a) HSM 21306 PT 28543 Sek 4 Mukim Kapar, District Klang.
(b) HSM 21307 PT 28544 Sek 4 Mukim Kapar, District Klang.
(c) HSM 21308 PT 28545 Sek 4 Mukim Kapar, District Klang.
(d) HSM 21309 PT 28546 Sek 4 Mukim Kapar, District Klang.
(e) HSM 21310 PT 28547 Sek 4 Mukim Kapar, District Klang.
(f) HSM 21311 PT 28548 Sek 4 Mukim Kapar, District Klang.
(g) HSM 21312 PT 28549 Sek 4 Mukim Kapar, District Klang.
(h) HSM 21313 PT 28550 Sek 4 Mukim Kapar, District Klang.
(i) HSM 21314 PT 28551 Sek 4 Mukim Kapar, District Klang.
(j) HSM 21315 PT 28552 Sek 4 Mukim Kapar, District Klang.
(k) HSM 21316 PT 28553 Sek 4 Mukim Kapar, District Klang.
(l) HSM 21317 PT 28554 Sek 4 Mukim Kapar, District Klang.
(m) HSM 21318 PT 28555 Sek 4 Mukim Kapar, District Klang.
(n) HSM 21319 PT 28556 Sek 4 Mukim Kapar, District Klang.
(o) HSM 21320 PT 28557 Sek 4 Mukim Kapar, District Klang.
(p) HSM 21321 PT 28558 Sek 4 Mukim Kapar, District Klang.
(q) HSM 21322 PT 28559 Sek 4 Mukim Kapar, District Klang.
(r) HSM 21323 PT 28560 Sek 4 Mukim Kapar, District Klang.

[103] General damages for loss of use of the aforesaid property, aggravated damages for wrongful detention of the aforesaid property, and exemplary damages are to be assessed by the senior assistant registrar of the High Court at Kuala Lumpur and once assessed they are to be paid to the appellant by the first respondent. The costs of such assessments are to be borne by the first respondent.

[104] All damages are to carry interest at 8%pa from 4 May 2007 until one day before the order to be made. Thereafter, on all heads of damages including pre-order interest would be at 8%pa from the date of the order until full realisation thereof.

[105] Deposit is to be refunded to the appellant.

Appeal allowed with costs.

Reported by Kohila Nesan